FREDERICK PHILLIPS ET AL.

IBLA 76-172 etc. Decided June 22, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications AA 7608, etc.

Set aside and remanded.

1. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Hearings

   Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

2. Administrative Procedure: Generally -- Administrative Procedure: Hearings -- Alaska: Native Allotments -- Contests and Protests: Generally -- Hearings -- Rules of Practice: Government Contests

   Where Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

APPEARANCES: Alaska Legal Services Corporation for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The 16 appeals listed in Appendix A all involve Native allotment applications filed pursuant to the Act of May 17, 1906, (hereinafter the Act), 34 Stat. 197, as amended by the Act of August 2, 1958, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and the implementing regulations at 43 CFR Subpart 2561. All of the applications were rejected in whole or in part in 1975 and 1976, by the Alaska State Office, Bureau of Land Management (BLM), for failure to establish the use and occupancy required by the Act. 1/ Because the central issue in each case is the nature and extent of use and occupancy of the land by the applicants, the appeals have been consolidated for the purposes of this decision. 2/ Most of the cases involve the adequacy of such use and occupancy prior to a withdrawal, or to a selection by the State of Alaska.

[1] In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute, due process requires that the applicants

> must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Pence v. Kleppe, supra, at 143.

Following that decision, the Board ruled that applying the Departmental contest procedures, 43 CFR 4.451 et seq., would satisfy the requirements of due process. Where a factual issue exists as to the applicant's compliance with the use and occupancy requirements of the act,

> BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence

1/ Action on these appeals was stayed pending rulings from the United States Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

2/ Cases 76-234, 76-376, and 76-478 were consolidated with 15 other Native allotment appeals under the rubric Mary Klein Zimin, 76-639. On further consideration of the matter we have decided that these three cases should be decided with the others in this decision and separate opinions issued for other cases originally consolidated.

> prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-242, 83 I.D. 308 (1976), reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

John Moore, 40 IBLA 321, 324 (1979). Recently, the Court of Appeals held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, supra. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

[2] Accordingly, these applications are remanded to BLM to review the case files, including any evidence filed subsequent to the initial decisions to reject. If BLM determines any application should still be rejected for failure to establish use and occupancy of the land, BLM should initiate a contest proceeding as outlined in our decision in Donald Peters, supra.

Appellants have raised many issues in these appeals. The right of Native allotment applicants to a hearing was resolved in the Pence litigation, supra. Except to the extent prior decisions of this Board should no longer be followed on the hearing issue because of Pence, many of the other issues raised by appellants have been decided by prior decisions of the Board. For example, see cases cited in John Moore, supra; Stanley P. McCormick, 23 IBLA 304 (1976); Cecil R. Sholl, 23 IBLA 17 (1975); Natalia Kepuk, 23 IBLA 99 (1975). To the extent there may be issues raised in a specific case here which possibly have not been fully answered by prior decisions of the Court of Appeals and this Department, such issues may best be resolved after a hearing if there remain factual disputes. For this reason, we do not make any ruling at this time on the adequacy of the use and occupancy alleged by any applicant. That determination will best be made following a hearing where all the facts have been ascertained. The facts should establish the type and extent of the use, whether others may have used and occupied the land, whether there may have been a failure to substantially continue to use or occupy land or an abandonment of the land by an applicant for a substantial period from the time asserted to the date of the application, and all other matters which would show the factual basis for ascertaining whether the requirements of the Act have been satisfied.

Many of these cases involve conflicting State and village selection applications. For each case, BLM should determine all adverse parties, including other Federal agencies, giving notice, and, if the adverse interest is substantial, an opportunity to participate in any proceedings. In the event BLM approves a Native allotment application, any conflicting applicant should be given notice and an opportunity to initiate a private contest. See State of Alaska, 40 IBLA 79 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further proceedings consistent with this decision.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Newton Frishberg
Chief Administrative Judge

APPENDIX A

IBLA NO.	NATIVE ALLOTMENT NO.	APPLICANT
76-172	AA-7608	Frederick Phillips
76-196	AA-6234	Sophia Grindle
76-222	F-13872	Nicholas A. Charles
76-234	AA-7605	Paul S. Phillips
76-252	AA-7069	Neil A. Sargent
76-265	F-12213	David A. Joe
76-286	AA-8279	Ellamae Chaney
76-321	F-16135	Annie David
76-350	AA-8202	Walter Chulin
76-351	AA-7901	Alexandra Matsuno
76-376	F-12305	Annie F. John
76-417	F-16150	Joseph Fink, Jr.
76-418	F-16159	Susan Riley
76-455	AA-5974	Alice E. Brown
76-471	F-17132	Sarah Henry
76-478	AA-7191	Natalia Wassilliey